REMARKS

Reconsideration of the present application is requested. The claims have not been amended with this submission but stand as amended in Applicant's response of August 9, 2007. In an Advisory Action dated September 6, 2007, it was indicated that the amendment was entered.

In that Advisory Action, a non-statutory double patenting rejection was maintained. Applicant had previously submitted a terminal disclaimer with respect to issued patent No. 6,595,998. The double patenting rejection presently under consideration is with respect to two pending applications, S.N. 10/458,174 and S.N. 11/084,288. It is noted that only two co-pending applications are identified in the latest Advisory Action. However, in an Office Action dated Sept. 21, 2006, additional pending applications were identified, including S.N. 10/623,791 (which has since issued as U.S. Patent No. 7,153,305); 10/624,066 (which was subsequently expressly abandoned); and 11/371,475. It is thus unclear whether the obviousness-type double patenting rejection with respect to the '791 and '475 applications has been maintained.

Applicants submit concurrently herewith a terminal disclaimer directed to U.S. Patent No. 7,153,305, which issued from the '791 application, and a terminal disclaimer directed to prior-filed co-pending application S.N. 10/458,174, in accordance with M.P.E.P. 804(B)(1). Thus, the non-statutory double-patenting rejection in view of the '174 and the '791 applications has been traversed.

The two remaining applications, S.N. 11/084,288 and S.N. 11/371,475, were both filed after the present application. Neither application has been substantively examined, so there are no rejections of any kind pending in either case. Thus, regardless of whether the current claims in either case are deemed to present a double patenting issue, it is not known whether these claims will continue without amendment in either pending application. From the perspective of the present application, there is no foundation for requiring cancellation of any of the pending claims alleged to be in conflict with any claims of these two later-filed applications.

M.P.E.P. 804(B) provides that a provisional double patenting rejection should continue "unless that 'provisional' double patenting rejection is the only rejection remaining in at least one of the applications." That is the case with this application – the only grounds for

rejection is double patenting. Under M.P.E.P. 804(B)(1), in the case where the ODP rejection is the only rejection remaining in two pending applications, the ODP rejection must be withdrawn in the earlier-filed application, "thereby permitting that application to issue without need of a terminal disclaimer" with respect to the later-filed application. This requirement applies here. There is no need or requirement for Applicant to file a terminal disclaimer in this earlier-filed application. If and when the claims of the later-filed applications are examined, an ODP can be levied against those claims. There is no support for requiring Applicants' to terminally disclaim with respect to any later-filed applications.

In the Advisory Action it was suggested that Applicants must either cancel conflicting claims from all but one application or "maintain a clear line of demarcation between the applications." As explained above, there is no basis for requiring cancellation of claims in the present application that has an earlier filing date than the other co-pending applications. There is further no basis for requiring cancellation of the claims in those co-pending applications because they have not been examined in view of the prior art. It is not known whether the allegedly conflicting claims of the later-filed applications will survive without amendment, but if they do a requirement for terminal disclaimer would then be appropriate.

It can further be pointed out that a clear line of demarcation does exist with respect to all of the applications identified in the double patenting rejection. For instance, the claims of the present application are directed to a method of providing interbody spinal fusion including the step of accessing the intradiscal space between two vertebrae. The claims of the prior-filed '174 Application concern a method for reduction of a vertebral compression fracture including the step of accessing the space within a vertebral body. Issued patent No. 7,153,305 includes claims to a method for treating a tibial plateau fracture including accessing the space under the tibial plateau. The line of demarcation is clear between these three sets of claims.

The claims of the later-filed '288 application are directed to fusing adjacent bone, including securing or interlocking an inserter to an adjustable fusion implant. The later-filed '475 application also includes claims directed to the combination of an expandable implant with an inserter. The independent claims of the present application do not recite an inserter, so the line of demarcation with respect to the '288 and '475 applications is clear.

Based on all of the Advisory Actions, it appears that the provisional double patenting rejections are the only issues outstanding in this case. It is therefore believed that Applicants have addressed all outstanding requirements with the submission of the terminal disclaimers

with respect to the earlier-filed applications, namely, application S.N. 10/458,174 and issued patent No. 7,153,305. Action toward issuance of a Notice of Allowance is earnestly requested.

The Examiner is invited to contact the undersigned to address any outstanding issues that may be addressed telephonically to advance this application to allowance. In particular, if Applicant's interpretation of the rules regarding the ODP rejections and terminal disclaimers is demonstrated to be incorrect, it is requested that the Examiner contact Applicants' agent to reiterate the continuing ODP rejection, at which time Applicants will submit additional terminal disclaimers as necessary.

Respectfully submitted,

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